AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2191651
MULTILINGUAL PSYCHOTHERAPY CNTRS INC
1639 FORUM PL STE 7
WEST PALM BEACH FL 33401-2330

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2009-166888L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated June 2, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 2010**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2191651
MULTILINGUAL PSYCHOTHERAPY CTRS INC
MARIA CABRAL
1639 FORUM PL STE 7
WEST PALM BEACH FL 33401-2330

PROTEST OF LIABILITY
DOCKET NO. 2009-166888L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 2, 2009.

After due notice to the parties, a telephone hearing was held on April 21, 2010. The Petitioner was represented by it attorney. The Petitioner's Administrative Director and the Petitioner's Program Director testified as witnesses.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party working as a behavioral technician constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which provides mental health and behavioral services under the Medicaid program.
2. On August 8, 2007, the Petitioner entered into an *Independent Contractor Agreement* with the Joined Party to provide therapeutic support services to the Petitioner's clients as a behavioral technician. The term of the Agreement was for a period of one year. Either party could terminate the Agreement with sixty days written notice. The Petitioner could terminate the Agreement immediately for cause under certain conditions as specified in the Agreement.

3. The Petitioner's Program Director provided an orientation for the Joined Party during which the Program Director discussed the objectives of the behavioral health program and the documentation required by the Medicaid program. The orientation provided to the Joined Party was separate from the orientations provided to the Petitioner's employees.

4. The Joined Party did not provide the client support services, or any other services, at the Petitioner's place of business. All support services were provided by the Joined Party at schools or at the homes of the clients. The Petitioner did not provide any instructions to the Joined Party concerning when to perform the work or where to perform the work.

5. No tools, equipment, or supplies were needed to perform the work other than Medicaid forms. The Joined Party was required to provide his own transportation. The Petitioner did not reimburse the Joined Party for any expenses.

6. The Petitioner did not train the Joined Party concerning how to perform the work and did not give the Joined Party any instructions about how to perform the work. Medicare regulations require that behavioral technicians complete in-service training. In-service training was provided by the Petitioner's Program Director; however, the Petitioner did not require the Joined Party to participate in the in-service training provided by the Petitioner.

7. Medicaid regulations require that the behavioral technicians must work under the supervision of a bachelor's level practitioner. The Program Director was considered to be the Joined Party's supervisor. The Program Director never observed the Joined Party when the Joined Party performed the work. The Program Director reviewed the documentation submitted by the Joined Party and conducted surveys with the clients to determine the clients' level of satisfaction. As long as the clients were satisfied, the Petitioner was satisfied. The Petitioner provided guidance to the Joined Party regarding clinical issues.

8. The Joined Party had the right to accept or reject work assignments. The Joined Party was free to provide behavioral technician services for other mental health service providers.

9. The Petitioner paid the Joined Party by the "unit" which is defined by Medicaid as a fifteen minute increment during which covered services are provided. In order to be paid by the Petitioner the Joined Party had to submit a weekly billing summary, progress notes, and attendance forms indicating the total units worked. The Joined Party was paid $2.50 per unit which was based on a pay rate of $10 per hour.

10. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, or paid time off. At the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

11. Based on information received from clients the Petitioner determined that the Joined Party had been paid for services which the Joined Party had not provided. As a result the Petitioner terminated the agreement on or about March 23, 2009.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

13. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

14. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

15. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

16. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:

    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:

        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;

        (b) whether or not the one employed is engaged in a distinct occupation or business;

        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

        (d) the skill required in the particular occupation;

        (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

        (f) the length of time for which the person is employed;

        (g) the method of payment, whether by the time or by the job;

        (h) whether or not the work is a part of the regular business of the employer;

        (i) whether or not the parties believe they are creating the relation of master and servant;

        (j) whether the principal is or is not in business.

17. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.

18. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

19. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

20. The Petitioner and the Joined Party entered into a written *Independent Contractor Agreement* which clearly states that the Joined Party was engaged to perform mental health support services for the Petitioner's clients as an independent contractor.

21. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

22. The regulations of the Medicaid program provide that the Joined Party was required to work under the supervision of a higher level practitioner. The Petitioner did not directly supervise the Joined Party or direct and control the Joined Party concerning when to perform the work, where to perform the work, or how to perform the work. The Petitioner merely reviewed the documentation submitted by the Joined Party and conducted surveys with the clients to determine the clients' level of satisfaction. These facts reveal that the Petitioner was only concerned with the end result rather than the means and manner of performing the work.

23. Based on the evidence submitted in this case it is concluded that the services performed for the Petitioner by the Joined Party working as a behavioral technician do not constitute insured employment.

Recommendation: It is recommended that the determination dated June 2, 2009, be REVERSED.

Respectfully submitted on June 21, 2010.

R. O. SMITH, Special Deputy
Office of Appeals